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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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This brief is filed in opposition to the petitioner's prayer for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

QUESTION PRESENTED

The Government's statement of the question presented (Pet. 1-2) is inaccurate. If accepted, it contains within itself an answer favorable to the Government. This is so because of the following italicized words found in the question:

> "Whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939 Code) is essential to the validity of an assessment of federal income taxes where,

prior to assessment, the taxpayer has filed *(as provided in Section 272(d) of that Code)* a waiver of restrictions on assessment and collection." (Emphasis supplied).

The very question at issue is whether the subject waiver has complied with the requirements of and is within the meaning of Section 272(d) as read in conjunction with Section 272(a)(1). To postulate that the taxpayer has filed a waiver "as provided in Section 272(d)" is to beg the question.

Consequently, the respondent submits that the question is as follows:

"For taxable years prior to 1954, does the execution by a taxpayer of a U. S. Treasury Form 870 (as distinguished from a U. S. Treasury Form 870-TS), prior to the issuance of a statutory notice of deficiency by the Commissioner of Internal Revenue, relieve the Commissioner from the restrictions imposed upon him by Section 272(a) of the 1939 Internal Revenue Code?"

STATUTE INVOLVED

The statute involved is Section 272(a)(1) and 272 (d) of the 1939 Internal Revenue Code as set forth and italicized below:

"Sec. 272. Procedure in General.

(a)(1) Petition to Board of Tax Appeals. —

If in the case of any taxpayer, *the Commissioner determines* that there *is* a *deficiency* in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. *No* assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or *proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer*, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the begin-

ning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(d) Waiver of Restrictions.

The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

(Emphasis supplied).

STATEMENT

There are two areas in which the Government's statement is not correct. The first misstatement is found in the first sentence where it is said that the Commissioner received a U. S. Treasury Form 870 executed by the taxpayer

> "pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939, in which she waived the restrictions provided in Section 272(a) of the Code, and consented to the assessment and collection of a deficiency in income tax for the calendar year 1946 in the sum of $9,965.48 together with statutory interest." (Pet. 4)

Respondent submits that this is no more than a statement of preference which subsumes the answer to the question presented.

Secondly, the Government's statement emphasizes that the District Court held that the filing of a waiver by the taxpayer prior to the determination "of an assessment" by the Commissioner was premature and invalid. However, as pointed out in respondent's reply brief filed in the Ninth Circuit (Appellee's Br. 4), it is perfectly clear from a reading of the District Court's findings of fact and conclusions of law, and the cases relied upon therein, that the District Court meant "determination of a deficiency". That is, the terminology "determination of an assessment" was inadvertent as evidenced by the fact that the Commissioner does not and cannot determine an assessment, but may determine a deficiency.

Lastly, insofar as the statement of the case is concerned, it should be noted that the appeal in the Ninth Circuit was heard en banc and was followed by a unanimous decision by the full bench.

ARGUMENT

In its petition the Government assigns three major reasons in support of its prayer that a writ be issued. They are:

(1) The question is one of "substantial practical importance" because of the large number of cases arising under the 1939 Code which *"may be* affected" by the ruling below.

(2) There is a conflict among the Courts of Appeals.

(3) The decision of the Ninth Circuit in this case is erroneous.

Turning to the above reasons in the order set forth herein, the Court is asked to consider the following:

I

The Petition Presents No Important Question of Federal Law Which Needs To Be Settled By This Court

The sole question here is one of statutory construction. The petition recognizes that Congress has made the issue moot for all taxable years including and subsequent to 1954. This was accomplished by amending Section 272(d) of the 1939 Internal Revenue Code and providing in Section 6213(d) of the 1954 Internal Revenue Code that such a waiver may be executed "at any time" (Pet. 10). Nevertheless, the Government urges that the instant question, arising only under the 1939 Internal Revenue Code, should be reviewed because the question is one of "substantial practical importance" because of the large number of cases arising under the 1939 Code which *may be* affected by the ruling below (Pet. 10). But the possibility that there "may be" cases affected by the ruling does not mean, in the sense of Rule 19(b), that there is an "important question of federal law which has not been, but should be, settled by this court." Something more than a possibility is needed. Furthermore, it should be remembered that the Ninth Circuit's decision herein is controlling only with respect to taxpayers from the Ninth Circuit.

When one turns to look for the number of cases which may be affected, the petition offers only the statement that there are

countless delinquent taxpayers who are "estimated" to number 900,000. However, the Government does not set forth how many of this "estimate" live in the Ninth Circuit, nor how many involve years prior to 1954, nor has petitioner told the Court what the relationship is between the amount of dollar revenue involved and the requirement of Rule 19(b) that there be an important question of federal law which has not been but should be settled. Petitioner suggests that the "estimate" of 900,000 delinquent income tax accounts for unknown taxable years is no stronger an argument than the loss of "hundreds of millions of dollars of revenue" contention which was submitted by the same petitioner as a ground for issuance of a writ in their petition seeking review of the brick and tile percentage depletion cases. *United States of America v. Merry Brothers Brick & Tile Company, et al*, No. 220, October Term, 1957, Pet. 8. Since the writ did not issue in that matter, it is difficult to see how an *unknown* revenue loss, if any, from Ninth Circuit taxpayers is of greater importance.

Furthermore, it is not quite accurate to say, as the Government has, that delinquent Ninth Circuit taxpayers "will *now* be in a position" to "resist further collection" on the ground that the waiver was ineffective and the assessment invalid. (Emphasis supplied) The rule that such waivers were invalid has been the established law in the Ninth Circuit since 1933 when *Mutual Lumber Co. v. Poe*, 66 F. 2d 904 (C.A. 9th, 1933), cert denied, 290 U.S. 706, held such waivers to be premature and invalid if executed prior to the issuance by the Commissioner of a formal statutory notice of deficiency. Subsequently, the rule was reaffirmed in *McCarthy Co. v. Commissioner*, 80 F. 2d 618 (C.A. 9th, 1935), cert denied, 296 U.S. 655, and followed in *East Bay Water Co. v. McLaughlin*, 24 F. Supp. 222 (D.C.N.D. Cal., 1938), Government's appeal to C.A. 9th dismissed on stipulation, 104 F. 2d 1016.

The method by which petitioner has sought to avoid the long standing of the Ninth Circuit's rule so that the above word "now" might be used, and so that a sense of urgency could be conveyed

in its petition herein, was to argue by footnote (Pet. 6) that the *Mutual Lumber Co.* and *McCarthy* cases, *supra,* were "characterized in the *Delaney* case, . . . as involving 'different problems'." However, it has been accepted for many years by the looseleaf services, Mertens, and the U. S. House of Representatives that the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra,* held such waivers to be invalid. In view of the fact that opposing counsel usually differ as to the scope of a case's holding, respondent turns to those who have no stake in this litigation to see how disinterested parties have interpreted *Mutual Lumber Co. v. Poe, supra* and *McCarthy Co. v. Commissioner, supra.*

As shown below a Subcommittee of the Ways and Means Committee of the U. S. House of Representatives, the 1953 edition of the Commerce Clearing House Federal Tax Reporter, and Merten's treatise on Federal Income Taxation, all cite the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra,* as holding that a valid waiver cannot be given by a taxpayer prior to the formal determination of a deficiency as evidenced by a 90-day letter that there is a deficiency in tax.:

(1) "As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906, certiorari denied Jan. 6, 1936; McCarthy v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver *cannot* be given by a taxpayer *prior* to the formal determination by the Commissioner, *as evidenced by a 60 or 90 day letter* that there is a deficiency in tax". (Emphasis supplied)

Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3d Sess., on Proposed Revisions of the Revenue Laws 1938.

(2) ".858 Filed before deficiency notice. —
Waiver filed at the time of examination of the books by a revenue agent who found an additional amount of taxes due was *not valid, where executed before the deficiency notice* was mailed, to stop the running of interest or *to free*

the Commissioner from the restrictions on assessment and *collection in Section 272(a):*

Mutual Lumber Co. v. Poe, (CCA-9) 3 USTC ¶ 1158, 66 Fed. (2d) 904. Cert. denied, 290 U.S. 706.

McCarthy Co. v. Com., (CCA-9) 35-2 USTC ¶ 9674, 80 Fed. (2d) 68. Cert. denied, 296 U.S. 655.

East Bay Water Co. v. McLaughlin, (D.C.) 38-2 USTC ¶ 9485. Government's appeal to CCA-9 dismissed on stipulation, 104 Fed. (2d) 1016.

".859—Contrary to the cases at .858, above, the following hold that a waiver on Form 870 signed prior to the mailing of a deficiency notice is effective to stop the running of interest and to waive the restrictions on assessment and collection, including the sending of a deficiency notice:

Roos v. U.S., (Ct. Cls.) 40-1 USTC ¶ 9223, 31 Fed. Supp. 144.

Moore v. Cleveland Ry. Co., (CCA-6) 40-1 USTC ¶ 9180, 108 Fed. (2d) 656.

Diamond Alkali Co. et al. v. Driscoll, (D.C.) 40-2 USTC ¶ 9526.

Associated Mutuals, Inc. v. Delaney, (CA-1) 49-2 USTC ¶ 9346, 176 Fed. (2d) 179.

D. P. J. Randall v. Riddell et al., (DC) 52-1 USTC ¶ 9207." (Emphasis supplied)

3 CCH 1953 Fed. Tax Rep. ¶ 1354 at p. 17,557.

(3) "Where the amount of the tax is not disputed, the signing of the waiver will save the taxpayer interest upon the amount of deficiency which he agrees is due.[51] *Despite considerable opposition,*[52] a waiver which has been filed before the determination of a deficiency and the sending of a notice by the Commissioner has been held sufficient to terminate the accrual of interest charges as of the 30th day after such filing.[53]

"[52]This was occasioned by the decision in Mutual Lumber Co. v. Poe, 66 F. (2d) 904 (CCA 9th, 1933) cert. den. 290 U.S. 706, 78 L. Ed. 606, 54 S. Ct. 373 (1933),

which resulted in a special ruling by the Bureau to the effect that a waiver must be filed *subsequent* to the issuance of a statutory deficiency notice in order to curtail the accumulation of interest, which was published in full at Par. 7, 124 of P-H Fed. Tax Service for 1939. This same result has been arrived at in East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 (1938), appeal dismissed in 104 F. (2d) 1016 (CCA 9th, 1939), which held a prior waiver premature and invalid.

"[53]See Cleveland Ry. Co. v. Moore, 21 AFTR 1282 (U.S.D.C.,N.D. Ohio, 1937), aff'd 108 F (2d) 656 (CCA 6th, 1940), ...

In her discussion of 'The Proposed Internal Revenue Administrative Code,' 20 Taxes 390, at 398, (1942), Harriet Geary explains that the *contemplated* Sec. 2604 thereof, embodying restrictions on assessment and future deficiency notices, to subsection (c) on waiver of restrictions, there is added a new phrase granting the taxpayer the right to waive the restrictions contained in subsection (a) 'at any time after the date prescribed for filing the return.' *This addition was made necessary by a conflict of the decisions between the Ninth Circuit* Court of Appeals Mutual Lumber Co. v. Poe, 66 F (2d) 904, (CCA 9th, 1933), cert. den. 290 U.S. 706, 78 L. Ed. 606, 54 S. Ct. 373 (1934); McCarthy Co. v. Comm., 80 F (2d) 618 (CCA 9th, 1935), cert. den. 298 U.S. 655, 80 L. Ed. 1381, 56 S. Ct. 675 (1936), *which had held a waiver signed before the mailing of a deficiency notice invalid, and the Sixth Circuit Court of Appeals* (Moore v. Cleveland Railway Co., 108 F (2d) 656 (CCA 6th, 1940)), *which had held to the contrary . . .* " (Emphasis supplied)

9 Mertens, Law of Federal Income Taxation, ¶ 49.99 (1943).

Can it be said, after reviewing the above material, that this is a new problem or that the Government has not known for years that such waivers were invalid if executed prior to the issuance of a notice of deficiency? And if it has been cognizant of the Ninth Circuit's rule, should it now be granted certiorari because "The Government has long *assumed*" that "there was no need to send a statutory notice of deficiency"? What is happening is that al-

though the Government has known for the past 25 years that such waivers were invalid in the Ninth Circuit, it is now asking this Court to grant certiorari because it has long "assumed" that such waivers were valid. Yet all the Commissioner was required to do to avoid the problem was to comply with the law in the Ninth Circuit and issue a notice of deficiency.

Consequently, in light of the foregoing, it is submitted that there is no *important* question of federal law which *should be* settled by this Court.

II

The Conflict Among The Circuits Is Now A Moot Issue

Even though there is a conflict among the circuits on the question before the Court, it is one which has existed since 1940 when the Sixth Circuit handed down its decision in *Moore v. Cleveland Ry. Co.*, 108 F. 2d 656 (C.A. 6th, 1940) and a question which has already been resolved by Section 6213(d) of the 1954 Internal Revenue Code for all taxable years after 1953. In short, the conflict among the circuits is not about an issue which is a live one because the statute has been amended in a manner which prevents the problem from arising in the future. In such a case, certiorari has been denied despite the square conflict. See, e. g., *United States v. Abrams*, 344 U.S. 855; *Community Services, Inc. v. United States*, 342 U.S. 932; *Sokol Bros. Co. v. Commissioner*, 340 U.S. 952; *Beal v. United States*, 340 U.S. 852; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-7 (1953).

III

The Decision of the Ninth Circuit Was Not Erroneous

In support of its conclusion that the decision below is wrong, petitioner has cited certain of the language from Section 272(a) and (d) of the 1939 Internal Revenue Code. On the other hand, respondent submits that the Ninth Circuit's decision is supported

by the legislative history of Section 272(d) of the 1939 Internal Revenue Code and is the product of a sound analysis of the problem.

A

The Legislative History of Section 272(d), Internal Revenue Code of 1939.

In order to place the entire issue in its proper framework of reference, two things should be remembered. First, Section 272 of the 1939 Internal Revenue Code is the direct descendant of Section 274 of the Revenue Act of 1924, 43 Stat. 253, C. 234. Second, Section 274 of the Revenue Act of 1924, was added to the law to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals.[1] That is, Section 274 of the Revenue Act of 1924 was a procedural section which established the procedure by which a taxpayer invoked the jurisdiction of the Board of Tax Appeals. The terms of Section 274 of the Revenue Act of 1924 are set forth below in toto.[2]

---

1. "Section 274(a): This subdivision provides for notice, and an opportunity for an appeal to the Board of Tax Appeals (a body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." H. R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258).

2. Sec. 274(a): If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b): If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c): If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d): If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided

A reading of Section 274 of the Revenue Act of 1924 reflects that if the Commissioner determined a deficiency in tax, the taxpayer "shall" be notified of such deficiency by registered mail. After receipt of the notice of deficiency, the taxpayer was then given 60 days to file an appeal with the Board of Tax Appeals. Thereafter, if the Board determined a deficiency, the amount so determined shall be assessed and paid upon notice and demand. On the other hand, if the Board disallowed the deficiency or part of it, the collector could not assess as to that amount, but he could without assessment, begin a proceeding in court for the collection of any amount so disallowed by the Board.

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in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or 3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

(e): If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in subdivision (d) of this section, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(f): Interest upon the amount determined as deficiency, or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment, shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax, or the payment of such installment, to the date the deficiency is assessed.

(g) (1): Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficency in accordance with the terms of the extension.

(g) (2): In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

Under the above procedure, both the Commissioner and the taxpayer would appear before the Board to present their cases. If a decision was in favor of the Commissioner, the tax could then be assessed, and the taxpayer was left to his remedy in the courts for a recovery of the tax.[3] If that decision was in favor of the taxpayer, the Commissioner could not assess the tax, but was left to his remedy in the courts in a suit to collect the alleged additional tax due.[4]

However, there was no provision in Section 274, Revenue Act of 1924, whereby a taxpayer, who did not intend to appeal to the Board of Tax Appeals, could stop the running of interest after the day the notice of deficiency was issued until the Commissioner assessed the tax sometime after the 60 day period had expired. Section 274(c), Revenue Act of 1924, *supra*. Thus, a taxpayer was required to pay a minimum of 60 days extra interest simply because of a procedural block which prohibited the Commissioner from assessing the tax even though the taxpayer might have decided not to appeal to the Board of Tax Appeals.

Therefore, in 1926, Congress took up the problem and adopted the first waiver provision in the form of Section 274(d),[5] and said in explanation thereof, speaking through the Senate Finance Committee:[6]

> "The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but*

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3. H.R. Rep. No. 1, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 315, 321).
4. H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 247).
5. "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." Section 274(d), Revenue Act of 1926, 44 Stat. 9, C. 27.
6. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332, 352).

without taking away the right of the taxpayer to take the case to the Board. It is provided that in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time." (Emphasis supplied)

In other words, Section 274(d), Revenue Act of 1926, granted a right to the taxpayer, but without taking away any right to take the case to the Board. Since Section 274(a), Revenue Act of 1926, provided that a taxpayer cannot appeal to the Board until he has received a statutory notice of deficiency, it is obvious that the new waiver subsection only applied after the taxpayer had received the notice of deficiency. This is the only conclusion possible in view of the Senate Finance Committee statement that Section 274(d), Revenue Act of 1926, permitting waivers, does not take away the right of the taxpayer to appeal to the Board. Clearly, the above-quoted language of the Senate Finance Committee shows that the waiver provisions of Section 274(d), Revenue Act of 1926, were designed to relieve the taxpayer from paying interest on an asserted deficiency, after a notice of deficiency was issued, for the 60 day period within which an appeal could be taken to the Board.

In view of the above quoted explanation, by the Senate Finance Committee, of the meaning of Section 274(d) of the Revenue Act of 1926, it was not surprising that the Ninth Circuit held in the 1933 case of *Mutual Lumber Co. v Poe, supra,* that waivers filed before the issuance of a notice of deficiency were premature and powerless to prevent the Commissioner's resort to a notice of deficiency, and said, at page 907:

" . . . If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Emphasis supplied)

Possibly this understanding was one of the reasons why Judge Sawtell also said, at pages 906-907:

"Section 274(a), supra, (26 USCA 1048), contains the

initial and important condition, 'if in the case of any taxpayer the Commissioner determines that there is deficiency in respect of the tax imposed by this chapter,' etc. This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section."

Nor was it unexpected that the *Mutual Lumber Co. v. Poe* case, *supra*, was reaffirmed and followed by the Ninth Circuit in the 1935 decision of *McCarthy Co. v. Commissioner*, *supra*, wherein Judge Garrecht said, at page 621:

"It has already been decided by this Court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, *is premature and therefore invalid.* In Mutual Lumber Co. v. Poe, 66 F. 2d 904, 906, certiorari denied, 290 U.S. 706, the late Judge Sawtelle said . . ." (Emphasis supplied)

Following the *Mutual Lumber Co. v. Poe*, and *McCarthy v. Commissioner* cases, *supra*, and because these were the only decided cases interpreting Section 274(d), Revenue Act of 1926, the question of the validity of waivers filed before issuance of a notice of deficiency was taken up in 1938 by a Subcommittee on Ways and Means.

The report[7] issued by this Subcommittee stated:

"As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906 certiorari denied Jan. 6, 1936; McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60 or 90 day letter that there is a deficiency in tax."

Consequently, the subcommittee recommended an amendment to what was then Section 272(d) (successor to Section 274(d), Revenue Act of 1926):

". . . to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall

[7] Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3rd Sess. on Proposed Revisions of the Revenue Laws 1938.

have the right, at any time after a deficiency is proposed in any manner that the Commission may direct, whether before or after sending of the notice of deficiency, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed."

However, this amendment was *not* adopted by the Ways and Means Committee and the language of Section 272(d), Internal Revenue Code of 1939 (successor to Section 274(d), Revenue Act of 1926) remained exactly as it was when the Senate Finance Committee Report of 1926[8] first introduced the subsection to the law as a measure whereby interest could be stopped, *"but without taking away the right of the taxpayer to take the case to Board."*

Therefore, on September 23, 1941, the Commissioner of Internal Revenue sought corrective legislation by publishing a Proposed Internal Revenue Administrative Code.[9] In the proposed code, which the Commissioner said would eventually be submitted to Congress, Section 2604 would have granted the taxpayer the right to waive the restrictions "at any time after the date prescribed for filing the return."[10] This language was designed to overcome the *Mutual Lumber Co. v. Poe* and *McCarthy v. Commissioner* cases, *supra*, holding that waivers to be valid under Section 272(d) of the 1939 Internal Code must be preceded by the issuance of a statutory notice of deficiency.[11]

However, like the 1938 proposed amendment, Section 2604 never became a part of income tax law until 1954 when Congress finally *changed* the language of Section 272(d). Thus, Section 6213(d) of the 1954 Internal Revenue Code added the following

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8. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 352, 352).

9. Letter of Commissioner of Internal Revenue, 1941-2 Cum. Bull. 368.

10. Harriet Geary, The Proposed Internal Revenue Administrative Code, 20 Taxes 390 at 398 (1942); See footnote 53 at 9 Mertens, Law of Federal Income Taxation, § 49.99, p. 87 (1943).

11. *Ibid.*

italicized words to what had previously been Section 272(d) of the 1939 Internal Revenue Code:

> "Sec. 6213(d) Waiver of Restrictions—The taxpayer shall at any time *(whether or not a notice of deficiency has been issued)* have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

In view of the above history of Section 272(d) of the 1939 Internal Revenue Code, it is submitted that the cases of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra,* correctly interpreted that subsection to mean that waivers filed before the Commissioner issued a notice of deficiency were premature and invalid. Surely this is the only interpretation which squares with the intention of Congress when it first placed the applicable language in a revenue act and said the waiver section did not take away the right of the taxpayer to appeal to the Board of Tax Appeals. Furthermore, Congress took no steps to change the language of Section 272(d) of the 1939 Internal Revenue Code until 1954, even though it had been told in 1938 by a Subcommittee of the Ways and Means Committee that the Ninth Circuit had held such waivers invalid, and it had seen Section 2604 of the Internal Revenue Administrative Code proposed by the Commissioner of Internal Revenue in 1941. Then when Congress finally did alter the substance of Section 272(d) of the 1939 Internal Revenue Code, it added the phrase "whether or not a notice of deficiency has been issued." Respondent submits that this failure of Congress to act, after notice, for nearly 20 years, coupled with the changed language of Section 6213(d) of the 1954 Internal Revenue Code is strong support of the conclusion that Section 272(d) of the 1939 Internal Revenue Code meant exactly what the Court said it meant in the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra.* Also when this later legislative history is considered in the light of the language of the original Senate Finance Committee report which introduced the same statutory language found in Section 272(d) of the 1939 Internal

Revenue Code, it is difficult to see how one could support a contention that the *Mutual Lumber Co. v. Poe* and *McCarthy v. Commissioner* cases, *supra,* should be overruled unless those cases holding contra *(Moore v. Cleveland Ry. Co., supra,* and *Associated Mutuals, Inc. v. Delaney, supra,)* are better reasoned or are based on statutory language which is clear and unambiguous. These cases will be examined in Point B hereof.

B

Moore v. Cleveland Ry. Co. and Related Cases Are Contrary To The Ninth Circuit's Decisions in Mutual Lumber Co. v. Poe and McCarthy v. Commissioner and Are Not The Better View

Seven years after the Ninth Circuit decided *Mutual Lumber Co. v. Poe, supra,* and five years after it decided *McCarthy v. Commissioner, supra* the first conflicting decision was handed down by the Sixth Circuit in *Moore v. Cleveland Ry. Co., supra.* All of the other contra decisions came later, and a reading of them will reveal that each rests upon and cites as authority, *Moore v. Cleveland Ry. Co., supra.* Therefore since the latter case is the fountain head of the view that waivers filed prior to issuance of a notice of deficiency are valid, to the extent that the Sixth Circuit's opinion in *Moore v. Cleveland Ry. Co., supra,* is poorly reasoned or based upon inadequate research, all of the other decisions are severely weakened.

An analysis of the opinion in the *Moore* case, *supra,* reveals that Judge Simons disregarded the Ninth Circuit interpretation in *Mutual Lumber Co. v. Poe, supra,* and in *McCarthy v. Commissioner, supra,* because, in his judgment, the Ninth Circuit's view took no account of "the phrasing of the Statute, the manifest purpose of 272(d), its history, or administrative practice". Turning to each of these factors in reverse order, the following is noted:

Administrative Practice

The administrative practice referred to is not elaborated on

further in Judge Simons' opinion. However, let it be assumed that it was the consistent practice of the Commissioner, prior to 1940, not to issue a statutory notice of deficiency, as required by Section 272 of the 1939 Internal Revenue Code, and its predecessors, once a taxpayer signed a waiver form under the purported authority of Section 272(d), Internal Revenue Code of 1939. If this was the case, the Commissioner was engaging in such practice during a seven year period when the only court decisions interpreting Section 272(d) and its predecessors had held such waivers to be invalid. *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra.* How can an administrative practice which violates the only reported court decisions as to the meaning of Section 272(d) support a contrary interpretation of Section 272(d)? Furthermore, what is the relevance or logical relationship between administrative practice and the meaning of a statute?

The History of Section 272(d)

Insofar as Judge Simons' reliance on the history of Section 272 (d) is concerned, it is necessary to point out that he did not cite or mention the 1926 Senate Finance Committee report, *supra,* which made the flat statement that the waiver subsection (Section 274(d), Revenue Act of 1926) permitted a waiver, "but without taking away the right of the taxpayer to take the case to the Board". Consequently, the Sixth Circuit did not deal with the problem of how the taxpayer could still have the right to appeal to the Board of Tax Appeals unless a notice of deficiency was issued prior to the filing of a waiver.

Furthermore, the strength of Judge Simons' historical supports must be evaluated in the light of his statements about the failure of Congress to amend Section 272(d) in 1938 even though a committee report recommended an amendment because of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra,* which invalidated such waivers. The opinion stated, at page 660:

> "It is true that no such amendment has yet been adopted by the Congress. The report from which we quote, however,

was made on January 14, 1938, and the grave concerns, domestic and international, which since that date have engrossed the Congress, and of which we take judicial notice, permit no adverse inference to be drawn from such failure, as appears to have been drawn in East Bay Water Co. v. McLaughlin, supra."

The respondent submits that the problems, both domestic and international, which confronted the Congress in 1954 were equally grave, and yet action was taken not only to amend Section 272 (d) but to finish a complete revision of the Internal Revenue Code. Where there has been a failure of Congress to act, after notice that the only existing case law held invalid those waivers filed before issuance of a notice of deficiency, it is doubtful that inferences drawn from such a failure to amend the law can be avoided simply by taking judicial notice that the 1938 Congress had other problems. If so, no inference is ever justified respecting the failure of Congress to amend legislation since it always has other domestic and international problems. What the historical reasoning of the *Moore v. Cleveland Ry. Co., supra,* opinion says in effect is that while Congress did not change what it recognized was the law as interpreted by the only reported decisions, namely that waivers were invalid if signed before a deficiency notice was issued, nevertheless the legislative history proves that such waivers are valid.

It is submitted that the legislative history of Section 272(d), reviewed in A hereof, considered along with the substantive content of Judge Simons' contentions respecting the legislative history, reflect that *Moore v. Cleveland Ry. Co., supra,* is not to be preferred over the Ninth Circuit's decisions in *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra.*

Manifest Purpose of Section 272(d)

Next the Sixth Circuit referred to the "manifest purpose" of Section 272(d) saying, at page 659, that:

"The purpose of § 272(d) is obviously to permit the taxpayer to settle his tax liability and the government to get its money without delay where no controversy remains between the taxpayer and the Commissioner . . ."

Respondent urges that a statutory purpose is not ascertained merely by labeling a preferred statement of purpose as "manifest" and following it with unsupported statements respecting the purpose of the statute. To begin with, the above-quoted language from *Moore v. Cleveland Ry. Co., supra,* is flatly contradicted by the previously cited language of the 1926 Senate Finance Committee report, *supra,* which stated that the purpose was to permit a taxpayer to pay the tax and stop the running of interest, "but without taking away the right of the taxpayer to take the case to the Board". Certainly it was not the intent of Congress in adopting Section 272(d) that the taxpayer's tax liability be settled if he was still to have the right to take the case to the Board. Rather it was simply to allow him to pay the alleged tax after issuance of a notice of deficiency and stop the running of interest. Furthermore, it has always been the law that the execution of a U. S. Treasury Form 870 did not settle a taxpayer's liability. In fact, further deficiencies may be claimed by the Commissioner after execution of such waivers. Thus, the purpose of Section 272(d) could not have been "to permit the taxpayer to settle his tax liability". Also, it is incorrect to say its purpose was to allow the Government to get its money. A taxpayer could always pay the asserted tax, prior to passage of Section 274(d), Revenue Act of 1926, but the taxpayer could not stop the running of interest because the tax could not be assessed.

Consequently, it is suggested that the "manifest" purpose of Section 272(d), as determined by *Moore v. Cleveland Ry. Co., supra,* is not what that opinion says it is.

The Phrasing of the Statute

Finally, *Moore v. Cleveland Ry. Co., supra,* relied on the phrasing of the statute as support for its refusal to follow *Mutual Lumber v. Poe, supra,* and *McCarthy v. Commissioner, supra,* saying at page 659:

> ". . . A deficiency is defined by § 271(a) as 'the amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return . . .' It would seem,

therefore, that whenever the taxpayer has failed to make adequate return of income, there is a deficiency, notwithstanding lack of determination by the Commission or his agents. *True, it is, that before there has been ascertainment, a waiver is too indefinite to avail the taxpayer as a bar to interest, or the Commissioner in collection.* Once the deficiency has been *ascertained*, however, *even though but tentatively*, and there is waiver with respect to the amount so ascertained, no reason appears why to that extent the waiver is not valid so as to permit assessment and collection to go forward with dispatch. The restrictions waived are in the taxpayer's interest and, if satisfied with the preliminary determination, he may make an earlier settlement of his liability so as to avoid further interest. This seems to be the clear meaning of § 272(d) which recites that 'the taxpayer shall at any time have the right, etc.' If by that section the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so. While it is true that there may be no appeal from a determination until it is final, this is not the only restriction provided by § 272(a). The waiver releases the Commissioner from obligation to wait 60 days after the mailing of the deficiency notice before making assessment or collection of tax." (Emphasis supplied)

The above reasoning should be closely examined before this Court grants certiorari because of it.

First, Section 272(a), which is the applicable section when interpreting Section 272(d), does not refer to "deficiency" as defined in Section 271(a), Internal Revenue Code of 1939. Instead it says:

> "If . . . the Commissioner determines that there is a deficiency . . ., the Commissioner is authorized to send notice of such deficiency to the taxpayer . . ."

Thereafter, Section 272(a) imposes restrictions against the Commissioner until he has issued such a "notice" of deficiency. Then Section 272(d) provides that "The taxpayer shall at any time have the right to waive those restrictions on the assessment and collection of *the deficiency*." Certainly the phrase "the deficiency" found in Section 272(d) can only refer to the deficiency "de-

termined" by the Commissioner referred to in Section 272(a). If Section 272(d) waives the restrictions set forth against assessing and collecting the deficiency which restrictions are set forth in the third sentence of Section 272(a), surely the meaning of "deficiency" is not determined by referring to an entirely different section such as Judge Simons has done in turning to Section 271 (a). The words "the deficiency" found in Section 272(d), which were not quoted by Judge Simon, qualify the words "shall at any time" found in the initial portion of the sentence. Section 272(d) simply means, as the Ninth Circuit held, that a taxpayer may waive the restrictions imposed upon the Commissioner by Section 272(a) upon the collection or assessment of "the deficiency". However, that deficiency must be ascertained or determined before it can be waived.

Judge Simons says there can be a deficiency before one has been determined, but interest on such a "deficiency" cannot be waived. However, he goes on to say that once it has been ascertained, even tentatively, interest on a tentative deficiency can be waived. This, it is submitted, is threading the needle in rather fine fashion. How can there be "ascertainment" on a "tentative" basis?

Not only is this a contradiction in terms, but Section 272(a) provides that the Commissioner must "determine a deficiency" and send a notice or certain restrictions are imposed. The section does not mention ascertainment on a tentative basis. The preliminary report of a Revenue Agent is not a deficiency, and a taxpayer cannot appeal to the Tax Court from such a provisional report. And if there can be no appeal without a notice of deficiency, how can waivers permitted by Section 272(d) not take away the right to appeal to the Board if there is no determination of a deficiency and no notice of a deficiency issued to the taxpayer before the waiver becomes valid?

When Section 272(d) permits a waiver of the restrictions against collection and assessment of "the deficiency", it means just what the Ninth Circuit said it means. There must be a de-

termination of a deficiency.

Finally the Sixth Circuit said, at page 659:

> ". . . If by that section (272(d)) the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so . . ."

This is exactly what Congress did say when the 1926 Senate Finance Committee reports stated that the filing of such waivers did not take away the right of the taxpayer to appeal to the Board. Also, Congress made it clear in 1954 when Section 6213(d) added the phrase "whether or not a notice of deficiency has been issued."

In the light of the foregoing material concerning *Moore v. Cleveland Ry. Co., supra,* the cases which follow it, and the other contentions respecting the interpretation of the statute contained herein, respondent submits that the Ninth Circuit's decisions in *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* correctly interpret the language of Section 274 (a) and (d), Revenue Act of 1926, which later became Section 272(a) and (d) of the 1939 Internal Revenue Code.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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